**U.S. Department of Labor**

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

**Issue Date: 15 January 2004**

CASE NO.'s: 2002-LHC-02262 / 02263
2003-LHC-00049 / 00050

***In the Matter of:***

**THOMAS MASSEY,**
Claimant,

vs.

**METROPOLITAN STEVEDORING CO.,**
**METRO RISK MANAGEMENT,**
**LONG BEACH CONTAINER TERMINAL, and**
**SIGNAL MUTUAL INDEMNITY ASSOCIATION**
Respondents,

Appearances: David Utley, Esq.
For the Claimant

Robert Babcock, Esq.
For the Respondent,
Metropolitan Stevedoring Co.

James Aleccia, Esq.
For the Respondent,
Long Beach Container Terminal

Before: Russell D. Pulver
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 ("the Act"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This claim was brought by Thomas Massey ("Claimant") against Long Beach Container Terminal ("LBCT"), its carrier Signal Mutual Indemnity Association ("Signal"), and Metropolitan Stevedoring Company ("Metro") and its carrier Metro Risk Management ("MRM"), arising from an injury to the lower back while employed as a longshore worker.

On October 10, 2002, the Director, Office of Worker's Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to the undersigned on February 5, 2003. A formal hearing was held before the undersigned on May 19 and 20, 2003, in Long Beach, CA, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-7, Claimant's Exhibits ("CX") 1-20, Metro's Exhibits ("MX") 1-7, and LBCT's Exhibits ("LBCTX") 1-25 were admitted into the record. Claimant, Dr. James Thomas, Mr. Timothy Long, Dr. James London, and Dr. Daniel Capen testified at the hearing.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## Stipulations

The parties stipulate and I find:

1. An employer/employee relationship existed as between Claimant and each employer during the relevant periods.

2. Coverage under the Act exists as to the claims against both employers.

3. The claim was timely filed, noticed and controverted.

4. Claimant has suffered an injury.

5. The alleged injury is unscheduled.

6. Respondents are not currently providing compensation or medical benefits.

## Issues

The remaining issues to be resolved are:

1. The identity of the last responsible employer.

2. The extent of Claimant's disability.

3. Entitlement to medical expenses.

4. Interest on past due benefits, if any.

5. Assessment of attorney's fees and costs.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

Claimant was born on February 23, 1953, and began working as a casual longshoreman in 1981. Hearing Transcript ("TR") at 52-53. In 1987, Claimant became a steady longshoreman with the International Longshore Workers and Warehouseman's Union ("ILWU"). TR at 53. In December of 1989, Claimant suffered serious industrial injuries to his low back, cervical spine and right shoulder during employment with Metro. TR at 55. As a result, Claimant underwent spinal fusion surgery on August 29, 1991. TR at 55. Dr. Thomas, Claimant's treating physician and orthopedic surgeon, performed the surgical procedure which consisted of bilateral foraminotomies and laminotomies, and bilateral posterolateral fusion at L5-S1 with left ililac grafting.[1] TR at 55; LBCTX 13 at 266-7. However, in 1992, x-rays revealed Claimant suffered from pseudoarthrosis, the failure of two or more spine segments to fuse together in a solid union. TR at 444.[2] Adamantly opposed to another surgery, Claimant returned to light duty work and by 1998, had resumed his regular work duties. TR at 55 and 57. In 1999, Claimant received a promotion within the union and became a certified crane operator which increased his salary and decreased his working hours. TR at 59.

In 1999, Claimant began working as a steady crane operator for International Transportation Services ("ITS"). TR at 64. Claimant's position allowed him to volunteer for other work at times when he was not needed by his steady employer.

In 2000, Claimant left ITS and became employed as a steady crane operator for LBCT. TR at 65. Claimant's duties included operating a crane to unload containers off ships. TR at 67. Operation of the crane required constant sitting, repetitive bending and looking down to the ground while sitting in the cab of a crane 110 feet in the air. TR at 67. Claimant was constantly pushing, pulling and maneuvering a handle to lower and raise the crane while unloading beams off of containers. MX 1 at 2. Claimant testified the cranes at LBCT were bumpier than the cranes at ITS, because they often shook while operating. TR at 66. Claimant worked four hours per day, three days per week, with forty-five hours of guaranteed pay. TR at 66.

On December 14, 2000, Claimant suffered a second injury while volunteer clerking at Metro. TR at 68. The injury occurred as Claimant descended the crane ladder. TR at 69. He lost his footing, fell down three steps and extended his left leg, resulting in a shock in his back. TR at 69. Claimant immediately reported the injury to his supervisor and subsequently sought medical treatment at Kaiser. TR at 69. Claimant was examined by his treating physician, Dr. Daniel Capen, on December 26, 2000.[3] TR at 69. Dr. Capen's examination revealed Claimant was symptomatic as he had limited motion of the spine and tenderness in his left hip. LBCTX 11 at

[1] Dr. Thomas is an orthopedic surgeon who predominantly treats adult patients with injuries to their cervical, thoracic and lumbar spine. TR at 144.

[2] When pseudoarthrosis occurs, fibrous tissue develops and occupies the area where the bone does not occur. It is the fibrous tissue that provides the support in some patients that makes them asymptomatic or actively symptomatic. Deposition Transcript of Dr. Thomas at 14-16.

[3] Dr. Capen was Claimant's treating physician during the interim between Dr. Thomas' departure for Las Vegas, NV, and his return. TR at 69. Dr. Capen was a full partner with Dr. Thomas at the Downey Orthopedic Medical Group from 1989-1994. TR at 147.

66. Although, Claimant was declared temporarily totally disabled, the injury did not prevent him from missing any work. TR at 159; LBCTX 11 at 66.

On February 23, 2001, Claimant suffered a third injury to his lower back. Claimant was sitting in his chair in the crane cab, and turned and bent forward to pull the pin out that allows the chair to swivel. TR at 70. The pin failed to dislodge and Claimant wrenched his spine. TR at 70. As a result, Claimant was unable to return to work until September of 2001. TR at 70. Claimant testified that his symptoms after the December 2000 incident were bad, but worsened after the February 2001 incident. Upon returning to work Claimant's duties became increasingly difficult as he suffered from burning sensations when on the crane and everyday tasks such as washing his car and bending over proved difficult. TR at 74. As a result of the accident, Claimant's wages decreased because he was unable to volunteer for extra work as his free time was spent in physical therapy. TR at 72.

The testimony of Dr. Thomas confirms the increased pain Claimant suffered subsequent to the February 2001 incident. Dr. Thomas testified the sudden wrenching motion was the "worst thing you can do," because it damages the fibrous tissue interface where the bony union failed to occur. TR at 159. If flexion/extension films had been performed, Dr. Thomas stated they would have shown an increase in Claimant's hypermobility at that point. TR at 159.

On July 2, 2001, Claimant was examined at LBCT's request by Dr. London, a board certified orthopedic surgeon. In the report Dr. London concluded the incident on February 23rd did not aggravate or worsen Claimant's pre-existing condition, rather it exacerbated his symptoms. TR at 366; LBCTX 9 at 46. Dr. London opined Claimant's current symptoms related to pre-existing conditions, specifically the injuries suffered in 1989 and 2000, the natural progression of his condition and his failed fusion. LBCTX 9 at 46.

On December 6, 2001 ALJ Alexander Karst issued a decision and order awarding benefits to Claimant. Judge Karst held LBCT liable for compensation following Claimant's February 2001 incident and ending when Claimant regained his earning capacity. MX 1 at 1.

On May 6, 2002, Claimant suffered a fourth injury to his lower back while employed at LBCT. A container spreader bar beam broke loose from a container causing the crane cab to shake. Claimant was jerked about and immediately felt a sharp pain in his lower back. CX 17 at 136. He continued working thinking the pain would subside. CX 17 at 136. However, Claimant began to note a burning pain in his lower back and when he got up at the end of his shift his legs were numb and weak. CX 17 at 136. Claimant reported the injury to his supervisor and was referred for medical attention. CX 17 at 136. On May 8, 2002, Claimant reported to Pacific Hospital after experiencing persistent and increasing low back pain that radiated down his left leg. Claimant also experienced pain and muscle spasms in his neck. TR at 74; CX 1 at 32. Claimant testified that as a result of the injury, his lower back pain became worse and he was unable to return to any type of work activity. TR at 86.

On May 9, 2002, Claimant filed a claim for compensation against LBCT. CX 9 at 91; LBCTX 3 at 3.

On May 20, 2002, Claimant was examined by Dr. Thomas.[4] TR at 75; CX 1 at 34. In his report, Dr. Thomas opined Claimant suffered a significant injury on May 6th, causing limitation of spinal mobility, a cervical strain in his neck, and muscle spasms in his lower back. CX 1 at 40. Dr. Thomas testified Claimant's spinal mobility was so significant at that point that it caused Claimant to become completely unstable. TR at 160. Dr. Thomas explained the reason Claimant may not have felt significantly different the day after the May 6th accident is because Claimant suffered a subtle injury. Dr. Thomas recommended Claimant continue physical therapy for his lumbar and cervical spine and held Claimant temporarily totally disabled until July 1, 2002. Moreover, Dr. Thomas testified that he would not have released Claimant back to work even if he had asked. TR at 92.

On July 1, 2002, Claimant was re-examined by Dr. Thomas. CX 1 at 26. In his report, Dr. Thomas noted physical therapy treatments controlled but failed to curb Claimant's pain. CX 1 at 26. Claimant complained that he could not walk or stand to any significance as back and leg pain was triggered by any activity, and only slightly relieved by lying down. CX 1 at 27. X-rays indicated Claimant's angulation measured ten degrees, documenting a lesser degree of support than in 1993 which measured three to five degrees. TR at 155. Dr. Thomas opined the increase in angulation represented a loss of support from the fibrous enveloping tissue. TR at 156. Dr. Thomas noted the injuries Claimant suffered since the 1991 surgery resulted in the disruption of the fibrous union. CX 1 at 28. Furthermore, Dr. Thomas testified Claimant was not capable of working at all and, "I could not, in good conscience, allow him to go back to work with the severe instability he had." TR at 165. Therefore, Dr. Thomas recommended Claimant undergo revision surgery. CX 1 at 29.

Claimant was examined by Dr. London on July 23, 2002. LBCTX 6 at 13. In his report, Dr. London opined Claimant's injury at LBCT in May 2002 did not aggravate or worsen the pre-existing condition in his back. LBCTX 6 at 19; TR at 360. Rather, Dr. London felt Claimant's current symptoms were related to the December 1989 injury, the pre-existing spondylolysis and spondylolisthesis, and the aggravation sustained to his back in December 2000. LBCTX 6 at 19; TR at 360-1. Dr. London testified that although surgery was performed on Claimant's spine in 1991, the spine remained unstable even after recovery from surgery. TR at 377. Dr. London opined an unstable spine will have flare-ups of pain and periods where symptoms are exacerbated. TR at 361. He concluded the May 6th incident had simply caused a flare up of symptoms, and by July 2002 Claimant had recovered from that flare up. TR at 362. For this reason, Dr. London testified that by July 2002, Claimant was capable of returning to work as a crane operator or at the least could perform work on various other boards on the waterfront. TR at 362; LBCTX 6 at 19. Additionally, Dr. London testified there was no objective change in Claimant's condition between his December 1989 and May 2002 incidents. TR at 401. Therefore, he believed it was not surprising that Claimant would have the symptoms he had prior to surgery, because he still had the same condition after surgery. TR at 377-8.

Similarly, Dr. Capen testified that Claimant's injuries at LBCT in February 2001 and May 2002 did not cause permanent aggravation or worsening of his lumbosacral spine condition.[5] TR

[4] Dr. Thomas had returned to California in May 2002 and resumed his role has Claimant's treating physician. TR at 148.
[5] Dr. Capen was called to testify as an expert by LBCT.

at 452. Dr. Capen stated the incidents incurred since the onset of pseudoarthrosis combined with the work activities performed have all caused exacerbation spikes. TR at 452. Dr. Capen explained the problem with pseudoarthrosis is that instead of a total bone bridge, there is scar tissue and fibrous tissue that gets stressed when there is motion through the segment. The stress can be from a torquing motion, slipping down stairs, or hyperextension from a car accident, all of which can contribute to the tearing of scar tissue. TR at 454. The result is inflammation, pain, and a chemical release of irritants to the nerve roots. After a period of time it heals, but the next time there is any force applied though the spine, it re-tears because there is no ability after a year of pseudoarthrosis for the bone cells to actually continue to grow across that space and form a fusion. In Claimant's case, it was never solid. TR at 455. Additionally, Dr. Capen testified an evaluation of the pain diagrams support that following the May 2002 incident, Claimant was still having a similar amount of pain, rather than a permanent worsening or aggravation. TR at 466.

In a report dated July 29, 2002, Dr. Thomas opined that a patient with a significant non-union fusion, where there is ten degrees of difference between flexion and extension, as documented on Claimant's radiographs, would not have been able to work at all or would have had extremely limited work activity during the period of time of such non-union. CX 1 at 21. Dr. Thomas explained Claimant's non-union most likely allowed him to return to work and to work successfully for many years until the accumulation of injuries occurred resulting in the disruption of the fibrous portion of the non-union. CX 1 at 21. The accumulation of injuries produced a substantial symptomatic non-union, which when full blown in its presentation resulted in pain and disability. CX 1 at 21, MX 4 at 19. Additionally, Dr. Thomas reiterated Claimant's need for revision surgery.

On August 6, 2002, LBCT filed a Notice of Controversion of Right to Compensation. MX 2 at 5; CX 8 at 83. LBCT disputed any and all benefits and claimed Claimant's December 1989 and 2000 injuries, in addition to the natural progression of his condition as the cause of Claimant's current disability. MX 2 at 5; CX 8 at 83. On the same date, LBCT also filed a Notice of Final Payment or Suspension of Compensation Payments, noting the date of last payment as August 11, 2002. CX 8 at 85.

On August 28, 2002, Claimant was involved in a car accident while driving with his wife and daughter. TR at 77. A car driven by Jesus Fajardo struck Claimant's Lexus from behind, resulting in approximately $3300 in damages. TR at 95. Claimant testified that no one was injured in the accident and there was no change in his symptoms from the few hours before the accident to the few days after. TR at 81. Claimant did not file an injury claim to his insurance company. TR at 82. However, Claimant was examined by Dr. Collins, his chiropractor, on August 29, 2002. TR at 81. Claimant testified the appointment was made prior and not in relation to the car accident. TR at 81. On the pain diagram Claimant reported neck, back and leg pain and identified the severity of his pain on a level of zero to ten. TR at 100. In his August 28, 2002 appointment, Claimant identified a pain level of seven and eight. On August 29th, Claimant's pain level was seven and eight as well as nine and nine. Claimant testified that he absolutely did not have increased symptoms in his low back following the accident and that the pain diagram does not reflect any increased pain. TR at 111 and 116.

Dr. Thomas testified that he did not find any material change in Claimant's condition following the accident. TR at 173. Dr. Thomas stated a rear-end collision of any type could have affected Claimant's lumbosacral problem; however, the auto accident did not worsen Claimant's condition. TR at 262. Prior to the accident Claimant had such severe angulation that Dr. Thomas had already determined the spine was unstable and had already recommended surgery. TR at 173. Therefore, even if the accident would have worsened Claimant's pseudoarthrosis, Dr. Thomas stated it did not worsen Claimant's condition or alter his recommendation of surgery. TR at 254.

The testimony of Timothy Long was offered to show the reasonable probability that Claimant suffered an additional injury in the August 28th accident. TR at 319. Long has worked as a research engineer at the firm Collision Research and Analysis in Torrance, California for approximately eight years. TR at 295. Long's firm performs accident reconstruction, evaluates vehicle safety systems, and vehicle component testing, including seat belt, airbag and seat testing. TR at 296. LBCT hired Long to reconstruct the impact occurring between Claimant and Medrano and requested an evaluation of the occupant injury exposure. TR at 300. Long explained the Delta V, a severity index, is a tool used by automotive researchers to determine the change of velocity upon the closing speed before impact, which relates to occupant injury exposure. TR at 315. A Delta V of five miles per hour indicates a potential injury exposure for a normal healthy adult male. TR at 303. Long testified the Delta V in the instant case was at least six miles per hour. TR at 330. Long stated a Delta V ranging from six to ten miles per hour is a range where one can expect injury. TR at 331.

Similarly, both Dr. London and Dr. Capen testified that an individual in Claimant's condition would be more prone to injury in a rear-end collision because of the instability of his spine. TR at 389 and 469. Dr. London stated Claimant's surgery, scar tissue, and past nerve root irritation symptoms in both legs, "All make Claimant more prone to an aggravation or worsening of his condition with a car accident." TR at 389. Furthermore, Dr. Capen testified Claimant's pain diagrams after the accident revealed increased back, hip and leg pain. TR at 468. Dr. Capen explained when seated in a vehicle, even in the best of circumstances when prepared to brace for a collision and the spine is completely against the seat, a jolt is likely to occur to the movable part of the spine. If the collision is sudden and the spine is in any other position than perfectly against the seat, force will be applied to the spine. TR at 469. Additionally, the weak portion of the spine, where there is already scar tissue, has a tendency to be more involved in damage. TR at 469. Therefore, Dr. Capen testified, the extension of Claimant's arm during the rear-end collision, further worsened and aggravated his condition. TR at 471.

Claimant was re-examined by Dr. Thomas on September 16, 2002. CX 1 at 12. Claimant continued to be symptomatic, as he suffered sharp stabbing pain any time he attempted to lift an object, bend or twist his body. CX 1 at 12. Dr. Thomas reviewed Dr. London's medical reports in which he concludes Claimant's condition was related to his initial injury. Dr. Thomas noted, "This doesn't make sense to me," and opined the stable pseudoarthrosis that allowed Claimant to function without pain and disability was disrupted by Claimant's December 2000, February 2001, and May 2002 incidents. CX 1 at 13-14. The incidents caused trauma to Claimant's spine, loosening the fibrous tissue interface that was holding the fusion in proper position allowing the patient to function without medication. CX 1 at 13-14. Since the incidents,

Claimant's condition deteriorated increasing in his need for surgery. CX 1 at 13-14. Furthermore, Dr. Thomas noted, "In the absence of these injuries I do not believe Claimant would be requiring surgery at this point." CX 1 at 7, 13-14.

On January 23, 2003, the Employment Standards Administration for the ILWU-PMA filed an application for intervention requesting a lien on compensation recovered by Claimant. CX 12 at 105. As of the filing date, the plan had advanced medical benefits to Claimant in the amount of $12,922.43 and continuing since the May 6, 2002 incident. CX 12 at 106.

Claimant was re-examined by Dr. Thomas on February 26, 2003. Claimant complained of pain in the left side of his neck and spine. CX 11 at 100. After a lengthy discussion, Claimant decided to proceed with surgical treatment. CX 11 at 100. Surgery was scheduled for April 28, 2003.

On April 11, 2003, Claimant was examined by Dr. Capen. CX 17 at 135. Dr. Capen reported Claimant was experiencing severe headaches and aching pain and muscle spasms in the spine and shoulders. CX 17 at 154-5. Claimant also experienced increased pain with prolonged sitting, standing and walking. CX 17 at 154-5. Dr. Capen noted the left side of Claimant's pelvis, sacroiliac and lumbar spine was worse. CX 17 at 155. Dr. Capen agreed Claimant was a candidate for revision surgery, however, he did not believe Claimant's disability stemmed from the most recent incident on May 6, 2002. CX 17 at 156. Rather, Dr. Capen stated, "Any and all of the work related activities that he did as a longshoreman, since the time of his original surgery have some small contributing factors to the fact that there is not a union or a solid bony fusion. While the jerking of a crane can cause pain in a back that has scar tissue and can cause problems, I don't think that this did anything specific to completely break apart the fusion." CX 17 at 156. Furthermore, Dr. Capen concluded the series of incidents since Claimant's surgery were mere flare ups and exacerbations, all contributing to Claimant's current level of symptoms, disability and need for further medical care. CX 17 at 156.

On April 28, 2003, Claimant underwent another surgery performed by Dr. Thomas. Claimant testified his reluctance and fear of surgery delayed the operation for many years. TR at 128. At trial, Claimant continued to experience slight leg pain from over standing and sitting. TR at 502. Claimant testified he was uncertain if he had fully recovered or was reaping the full benefits of the operation, but was hopeful that everything would work itself out. TR at 502. Dr. Thomas testified he was pleased with the early outcome of the surgery, and Claimant's ability to participate in the trial was a good sign. TR at 165.

## II. Discussion of Law and Facts

### *Last Responsible Employer*

The Ninth Circuit recently reaffirmed that under the "Last Responsible Employer Rule," a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries the worker suffered while working for more than one employer. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., et.*

*al.,* 339 F.3d 1102, 1104 (9th Cir. 2003); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The claimant's last employer is liable for all compensation due, even though prior employment may have contributed to the disability. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors Inc. v. Director, OWCP,* 950 F.2d 621, 623 (9th Cir. 1991).

The Ninth Circuit has applied the Last Responsible Employer Rule distinctly depending on whether the disability is an occupational disease, such as asbestos, or the result of cumulative traumas. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors*, 950 F.2d at 624. If the disability is an occupational disease, the responsible employer is the employer which last exposed the worker to the injurious stimuli prior to the date the worker became aware of suffering from the occupational disease. *Metropolitan Stevedore Co.*, 339 F.3d at 1105. In contrast, in cases where the disability is a result of cumulative traumas, so-called "two injury" cases, the responsible employer depends upon the cause of the worker's ultimate disability. *See id.* If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. *Id.* However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, the employer of the worker at the time of the most recent injury is the responsible employer. *Id*; *Foundation Constructors Inc.*, 950 F.2d at 624. In the present case, the circumstances of Claimant's lower back injury call for an application of the "two-injury" prong of the Last Responsible Employer Rule.

Claimant argues LBCT is the last responsible employer liable for all compensation due following the May 6, 2002 incident in its employ. Claimant testified the injury worsened his lower back pain resulting in his inability to walk and resume his regular work duties. Claimant also asserts the August 28, 2002, car accident does not sever the causal connection between work-related injuries, disabilities and need for surgery so as to relieve LBCT of its liability because he did not suffer any injuries. Therefore, Claimant argues all of his work injuries, including the last at LBCT in May 2002, contributed to his condition so as to render LBCT liable for compensation.

Metro also contends LBCT is the last responsible employer. Metro argues that all credible evidence in the record documents that Claimant's work injuries in December 2000, February 2001, and May 2002 each contributed to his ultimate disability and need for revision surgery. However, under the last responsible employer rule, LBCT must provide medical benefits and compensation for all disability following the last of those injuries. Therefore, Metro asserts liability runs to LBCT as Claimant's last employer.

On the other hand, LBCT argues Metro should be the last responsible employer for Claimant's revision surgery on a natural progression theory. LBCT asserts Claimant's lower back condition is solely attributable to the December 26, 1989 incident as opposed to the December 2000, February 2001, and May 2002 incidents. LBCT maintains the latter incidents were mere temporary exacerbations of Claimant's underlying orthopedic condition. Additionally, LBCT argues Claimant's car accident on August 28th, was significant and further worsened Claimant's pseudoarthrosis. Therefore, LBCT asserts it is relieved of liability.

Based on a review of the relevant case law and a careful analysis of the record, the undersigned finds LBCT was the last employer to have subjected Claimant to trauma that combined with, aggravated or accelerated his lower back condition. First, Claimant's employment with LBCT on May 6, 2002 contributed to and worsened Claimant's lower back condition. Claimant was jerked about when a container spreader bar beam broke loose from a container causing the crane cab to shake. Immediately, Claimant felt a sharp pain in his lower back. Dr. Thomas testified the injury was significant as it caused Claimant to become completely unstable. TR at 160. As a result, Dr. Thomas adamantly recommended Claimant undergo another spinal fusion operation to which Claimant later agreed. The undersigned recognizes that a series of incidents have caused trauma to Claimant's lower back and loosened the fibrous tissue interface that was holding the fusion in proper position, allowing Claimant to perform his work duties. However, LBCT's claim that the incident caused a mere flare up of symptoms or temporary exacerbation is hardly credible. Claimant's condition deteriorated significantly after the May 6th incident resulting not only in his inability to return to work but his increased need for revision surgery. Therefore, the trauma Claimant experienced on May 6th, while in LBCT's employ, reasonably contributed to and worsened Claimant's lower back condition.

Second, LBCT's argument that the August 28, 2002, car accident was a superceding event that worsened Claimant's pseudoarthrosis, is not persuasive. LBCT offered the testimony of Mr. Long to show the probability that Claimant suffered an injury. The testimony of Dr. London and Dr. Capen was also offered to show that an individual in Claimant's condition would be more prone to injury in a rear-end collision because of the instability of his spine. TR at 389 and 469. However, LBCT only showed an injury was possible, rather than an injury was more likely than not to occur. On the other hand, Dr. Thomas testified he did not find any material change in Claimant's condition following the accident. TR at 173. Dr. Thomas also testified that the accident did not worsen Claimant's condition because Claimant had such severe angulation prior to the accident, that it was already determined the spine was unstable and needing revision surgery. TR at 173. The testimony of Dr. Thomas is corroborated by Claimant who testified that he absolutely did not have increased symptoms in his lower back following the accident and that he did not file an injury report or seek medical care. TR at 111. Therefore, the car accident was not a superceding event as LBCT failed to successfully establish the accident aggravated Claimant's condition.

Lastly, although assignment of liability to LBCT by the Last Responsible Employer Rule may seem unfair, the Ninth Circuit established this bright line rule to avoid the difficulties and delays connected with trying to apportion liability among several employers. *Metropolitan Stevedore Co.,* 339 F.3d at 1107. The rule allows the apportionment of liability in an equitable manner, since all employers will be the last employer a proportionate share of the time. *Id*; *Foundation Constructors Inc.*, 950 F.2d at 623. The undersigned finds no reason to depart from this bright line rule.

Therefore, the undersigned finds substantial evidence in the record supports a finding that LBCT, as the last responsible employer, is liable for the totality of Claimant's disability.

***Extent of Disability***

Under the Act, Claimant has the initial burden of establishing the extent of his disability. *Trask*, 17 BRBS at 60. "Disability" under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. §902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. Of America,* 25 BRBS 100, 110 (1991). As Claimant's injury is a non scheduled injury, he must prove that he has suffered a loss of wage-earning capacity.

Additionally, under the Act, a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual employment. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989); *Elliot v. C & P Tel. Co.,* 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the employer may rebut by establishing the availability of suitable employment that the claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The employer must identify specific positions which are available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 1330 (9th Cir. 1980).

Claimant argues he suffered a loss of wage earning capacity following his February 23, 2001 injury at LBCT. Claimant asserts that following his return to work on September 15, 2001, his earning capacity was reduced from $2,791.20 per week to $2,151.69. The loss in earning capacity was the result of Claimant's inability to engage in the previous custom of accepting volunteer work at terminals other than LBCT. AX 2. Claimant's PMA wage records demonstrate the $639.51 weekly loss of earning capacity. CX 6 at 74. However, LBCT contends the pre-injury average weekly wage should be $1900.00 with a corresponding compensation rate of $966.08. AX 5. The record is devoid of any evidence from LBCT contradicting the difference in Claimant's pre-injury and post-injury earning capacity. Therefore, the undersigned finds Claimant has satisfied his burden of showing he has suffered a loss of wage earning capacity during the period beginning September 16, 2001 and ending May 6, 2002. The $639.51 loss in earning capacity entitles Claimant to a partial disability award of $426.34 per week.

In addition, Claimant argues he is entitled to temporary total disability benefits following July 23, 2002 to the present. Although Claimant received temporary total disability benefits from LBCT beginning May 7, 2002, payments ceased following July 23, 2002. Claimant seeks reinstatement of his benefits as he remains totally disabled and is unable to return to his former employment as a crane operator. On the other hand, LBCT argues total disability payments ceased because Claimant recovered from the physical effects of the May 6$^{th}$ injury by July 23, 2002. AX 4; AX 5.

The undersigned finds Claimant is entitled to payment of temporary total disability benefits by LBCT from July 23, 2002 to the present. First, substantial evidence in the record supports the finding that Claimant remains temporarily totally disabled and is unable to resume any work duties. By July 1, 2002, Claimant had endured continued physical therapy treatments for his

lower back condition consisting of ice, electrical stimulation and exercises. CX 1 at 26. However, the physical therapy treatments failed to lessen Claimant's pain. CX 1 at 26. Claimant suffered from a significantly unstable spine and angulation so severe that revision surgery was recommended. Further, Dr. Thomas testified, "I could not, in good conscience, allow him to go back to work with the severe instability he had." TR at 165. Moreover, in his July 29, 2002 report, Dr. Thomas opined that a patient, such as Claimant, with a significant non-union fusion would not have been able to work at all or would have had extremely limited work activity during the period of time of such non-union. Therefore, substantial evidence supports the conclusion that Claimant's total disability status continued from July 23, 2002 to the present.

Second, LBCT failed to rebut the presumption of Claimant's total disability. LBCT presented no evidence of suitable alternative employment that Claimant is capable of performing. The only support provided by LBCT was the testimony of Dr. London who stated the May 6th injury caused a flare up of symptoms, and by July 23rd Claimant had recovered from the flare up. TR at 362. Furthermore, Dr. London noted Claimant had returned to his pre-injury level and there were no work restrictions attributable to the May 6, 2002 injury. LBCTX 6 at 6. Therefore, LBCT failed to present evidence necessary to rebut the presumption of Claimant's total disability.

Third, in evaluating this issue, generally the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, Office of Worker's Compensation Programs*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9t Cir. 1999), 32 BRBS 144 (CRT), cert. denied 528 U.S. 809 (1999). In the instant case, Claimant's treating physician Dr. Thomas is entitled to special weight as he has been treating Claimant for approximately 12 years, and performed both his lower back surgeries.

Therefore, the undersigned finds substantial evidence in the record supports a finding that Claimant's status of temporary total disability continued beyond July 23, 2002, and LBCT is liable for disability benefits thereafter.

***Interest***

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), aff'd in part, rev'd in part sub nom.; *Newport News Shipbuilding & Dry Dock Co., v. Director*, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.I. Maduro,* 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.,* 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by LBCT should be included in the District Director's calculations of amounts due under this decision and order.

***Entitlement to Medical Expenses***

Claimant seeks compensation for medical expenses related to his lower back condition. Under Section 7(a) of the Act, reasonable and necessary medical expenses incurred since the

industrial injury may be assessed against the employer. 33 U.S.C. §907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. §702.402; *Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130, 1138 (1981). The record establishes Claimant has outstanding medical bills to Downey Orthopedic Medical Group, Pacific Physician's Management, and his union group medical insurance plan totaling $22,659.26.

***Attorney Fees and Costs***

In addition to disability compensation, Claimant seeks an award of attorney's fees and costs. According to Section 28(a) of the Act, a claimant who engages an attorney in the "successful prosecution" of his claim may collect a reasonable attorney's fee from his employer. Thirty (30) days is hereby allowed to Claimant's counsel from the submission of such an application. See 20 C.F.R. 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

## ORDER

Based on the foregoing Findings of Facts, Conclusions of Law and upon the entire record, I issue the following order.

It is therefore **ORDERED** that:

1. LBCT shall pay Claimant compensation for temporary partial disability for the period beginning September 16, 2001 and ending May 6, 2002.

2. LBCT shall pay Claimant compensation for temporary total disability for the period beginning July 23, 2002 to the present.

3. The District Director shall make all calculations necessary to effectuate this decision.

4. LBCT shall pay all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate and necessary medical care and treatment to Claimant's lower back injury as required by Section 7 of the Act.

A

Russell D. Pulver
Administrative Law Judge